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INTERNATIONAL AERIAL NAVIGATION AND THE PEACE CONFERENCE

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Aërial navigation, owing to the unusual impetus given to it by the Great War, now promises to result in one of the most profound influences affecting the conditions of modern civilization. It is difficult to realize that only twenty years have elapsed since the program of the First Hague Conference proposed "to prohibit the throwing of projectiles or explosives of any kind from balloons, or by any similar means"; and that one of the express causes inducing the nations of the world to agree to the proposal was the undeveloped character of the art of aviation.[1] Although the treaty was short-lived and expired in 1905, the art had so greatly advanced that a complete change of the attitude of many governments had taken place and the renewal of the treaty was out of the question.

The opening of the war inaugurated a feverish competition to perfect every possible type of aircraft for use in attack as well as for reconnaissance. The stern demands of military tactics introduced an entirely new phase in the development of aërial navigation.[2]

[1] Report of Captain Crozier to the United States Commission of the First Hague Conference. Holls, The Peace Conference at the Hague, p. 95. The reasoning of the subcommittee correctly anticipated by almost two decades some of the occurrences of the war. Captain Crozier reported that the action taken for humanitarian reasons was founded upon the opinion that balloons and other aircraft, as they then existed, constituted such inaccurate means of injury that their use would be dangerous to noncombatants; that "the persons or objects injured by throwing explosives may be entirely disconnected from the conflict, and such that their injury or destruction would be of no practical advantage to the party making use of the machines."

[2] "Ten times as many years would not have produced the same advance if the years had been devoted to peaceful pursuits and commercial uses of airplanes had been the only incentive to inventors and producers." Secretary of War Baker in the Introduction to Captain Arthur Sweetser's The American Air Service.

So long as war is possible, aircraft will continue to be developed as instruments of war, especially in connection with radiotelegraphy, radiotelephony, photography and other correlated scientific means. Fortunately the arts developed in war are quickly adapted and applied to the demands of peace; and of this truth, aërial navigation furnishes an excellent example. The year following the armistice witnessed many remarkable achievements in air navigation, demonstrating its future commercial value as a new means of intercommunication and transportation. The crossing of the Atlantic Ocean from the mainland of the United States to England, via the Azores and the European Continent, was closely followed by a continuous flight from Newfoundland to Ireland in about fifteen hours. The distance between New York and San Francisco and return was traversed in slightly more than forty-eight hours. The use of aircraft for the regular transportation of mails and passengers increases day by day both here and abroad. An art thus expanding by leaps and bounds requires a wise system of legal regulation and control, both in its own interest and for the safety of the community. Aërial navigation, like the navigation of the seas, is international in scope, and its adequate regulation by law presupposes the coöperation of nations through international conventions. This has long been recognized both by scientific experts and by jurists.[3] It was also accepted as a basic principle by the official International Conference upon Aërial Navigation held in Paris upon the call of the French Government in May, June and November, 1910,[4] and also by the unofficial Conference for the Regulation of Aërial Locomotion held at Verona in June, 1910.[5]

If the war had not intervened, the French Government would have convened another diplomatic conference to elaborate a code of international air law, or at least to establish a *modus vivendi* for international flying. The Conference of 1910 adjourned without finally approving a draft, though several drafts by Fauchille, Bar and others were discussed and referred for further deliberation. When the Peace Conference convened, in January, 1919, it appointed, among its many other subcommittees, a Commission on International Air Navigation

[3] Pesce in *Journal de droit international privé*, 1911, p. 115; Catellani, *Le droit aérien*, pp. 33-44 (translated by Bouteloup from the Italian).

[4] *Journal de droit international privé*, 1911, p. 986.

[5] De Valles in *Revue juridique internationale de la locomotion aërienne*, 1910, p. 175.

upon which representation was given to each of the five Great Powers, together with Belgium, Brazil, Cuba, Greece, Portugal, Roumania and Serbia.

THE CONVENTION RESTRICTED TO TIME OF PEACE

It is worthy of emphasis that diplomatic congresses held in times of peace often deal with the conduct of warfare, while conferences held at the close of a great war usually do not. The Congress of Vienna in 1815 and the Berlin Congress of 1878 dealt principally with political and territorial readjustments, while the Brussels Conference of 1874 and the Hague Conferences of 1899 and 1907 attempted to regulate the conduct of war. None of the many activities of the Peace Conference of 1919 was directed toward the regulation of warfare, or even of neutral rights in time of war. Perhaps three main causes may be assigned. First, because the gross violations of the laws of war by the Central Powers undermined confidence in the old system by which the nations consciously endeavored through self-denying ordinances to make the conduct of war more humane. Second, because the tremendous task of making the necessary territorial, economic and political readjustments absorbed the attention of the Conference. Third, because the Conference endeavored to establish international relations upon a new basis, with the object of eliminating, as far as possible, the causes of war.

The Commission on Air Navigation was one of a number of commissions created under the authority of the Peace Conference having nothing whatever to do with the adjustments of the war itself. Its labors, so far as they were connected with the work of the Peace Conference, consisted of the regulation of the new means of intercourse between nations in such a manner as to promote friendly relations and to avoid friction. The Convention relating to International Air Navigation [6] is reported to have been signed on October 13, 1919, by all the Allied and Associated Powers, excepting Japan and the United States.[7] The convention is restricted wholly to peace times and does not affect the freedom of action of the contracting states in time of war, either as belligerents or as neutrals.[8]

[6] U. S. Senate Document No. 91, 66th Congress, 1st Session (French and English texts).

[7] See the London *Times*, October 16, 1919.

[8] Convention, Art. 39.

SOVEREIGNTY IN THE AIRSPACE

The convention recognizes that every state has complete and exclusive sovereignty in the airspace above its territory and territorial waters.[9] But each state undertakes in time of peace to accord freedom of innocent passage to foreign aircraft without distinction as to nationality, provided the conditions of the convention are observed.[10] The convention thus sanctions the principle championed by Westlake at the 1906 session of the Institute, although at that time he could muster only three votes in support of his proposition. A large majority of the Institute were then in favor of a general declaration for the freedom of the airspace.[11] The attitude of English and American jurists and the practical developments of the war have now finally solved this *quæstio famosissima* in a manner which will probably be satisfactory to all. Any nation has the right to map out areas prohibited for military reasons or for public safety, but notice of such areas must be given to the central bureau and published. The fact that prohibited areas must apply alike to domestic as well as to foreign aircraft will serve as a counterbalance to any extreme view of military needs. The right of innocent passage is therefore practically assured.[12]

NATIONALITY OF AIRCRAFT

The convention determines the nationality of aircraft according to rules similar to those established for seagoing vessels. The aircraft possesses the nationality of the state on the registry of which it is entered. The owner must be a national; if the owner is a corporation, the president and two-thirds of the board of directors must be nationals.[13] It therefore follows that aircraft cannot be validly registered in more than one country at the same time.

[9] Convention, Art. 1.

[10] *Ibid.*, Art. 2.

[11] See *Annuaire de l'Institut du droit international*, 1906, p. 305.

[12] The legal status thus created may be compared to the right of vessels of one state freely to navigate an international river flowing from or through its own territory into a foreign state. Jefferson, while Secretary of State, relied upon this right in his negotiations with France, basing it upon "the law of nature and nations." Moore, Digest of International Law, Vol. 1, p. 624. The present writer suggested it as an analogy for international rights in the airspace, as early as 1908. Proceedings, American Political Science Association, 1908, p. 87; this JOURNAL, 1910, p. 114, "The Beginnings of an Aërial Law."

[13] Convention, Arts. 6-7. This was not the rule in the draft proposed by Paul

No nation may permit the flight above its territory of aircraft not possessing the nationality of one of the contracting states.[14] This marks an important variance from the rule of maritime shipping because vessels of all duly recognized countries are permitted to enter the territorial waters of other nations. The reason of the rule for aircraft is not to be sought in any intent to exercise indirect coercion upon states which have not yet ratified the convention, but in the fact that the right of free passage depends upon the strict observance of the conditions of the convention and upon the control which such observance affords. If the United States does not sign and ratify the convention, it would follow that our aircraft would be excluded from the territory of all the contracting states including Canada.

CERTIFICATES AND LICENSES

The issuance of certificates of airworthiness and the competence of officers and crew are matters within the jurisdiction of the contracting states so long as they observe the technical minimum standards set forth in the annexes. A permanent International Commission for Air Navigation is established which may vary these standards from time to time.[15] Certificates which are issued or rendered valid by the state of the aircraft's flag must be recognized in all other states. It is therefore difficult to comprehend why a state should have the right to refuse such recognition to certificates and licenses granted in a foreign state to a citizen of the local state residing abroad. If a state is willing to concede recognition to certificates and licenses granted in other states, why should it not have sufficient confidence in its own nationals to permit them to make flights over their home territory after having conformed to the same standards? The discrimination seems unreasonable in view of the fact that the standard is intended to be technically uniform in all states. It is difficult to explain the rule except in the light of the jurisprudence of European countries where the *lex patriæ* exerts an influence in regulating the acts of nationals abroad, to an extent unknown to the English com-

Fauchille at the Paris Conference of 1910. Ownership was to control nationality, but aircraft might be registered in the country in which the owner resided. Fauchille's Draft, Art. 3, *Journal de droit international privé*, 1911, p. 990.

[14] Convention, Art. 5.

[15] *Ibid.*, Arts. 11-13; Annexes B and E.

mon law. Personal capacity in those countries is measured by national law; and yet there can be no question of the evasion of that law here, because of the uniformity of the standard.

The annexes also provide in detail for the marks and numbers which aircraft must carry, also the lights and signals, rules of airway and markings of aërodromes. Great care seems to have been exercised in the preparation of these rules; they give evidence of having been arrived at empirically by men practiced in the art.

The adoption of the convention by the United States would seem to require that all State legislation be superseded. The Connecticut statute of 1911, for example, provides that no airship shall be flown through or to any point in the State, unless registered within the State, such registration to be renewed annually. The licensing of operators is similarly placed upon a local basis. The flying privilege of a non-resident of Connecticut, even though qualified by the laws of his residence, is limited to ten days in any one year.[16] It is curious to note that in the revision of 1918, the law is classified under the general heading of "Navigation," yet according to its tenor, aircraft are dealt with as though they were like automobiles traveling upon State routes and wholly subject to local law. Connecticut is entitled to the credit of having passed the first general law in the United States to regulate aërial navigation, doubtless through the efforts of its distinguished Governor, Simeon E. Baldwin, who himself showed deep interest in the early stages of the law of aërial navigation.[17] But the tremendous progress which aviation has made since that time and the achievement which it promises for the future have already rendered such legislation out of date. The speed at which aircraft can and must go, the free choice of route which they have, and the distances they now traverse without landing, all tend to destroy any analogy which may have existed with vehicles traveling upon the land.

NATIONAL LEGISLATION REQUIRED

Congress must deal adequately with the entire subject of air navigation in the event that the present convention is ratified and its terms made effective within the United States. Consider, for example, the provision permitting aircraft to cross the territory of another con-

[16] Connecticut Laws of 1911, Chap. 861; Revision of 1918, sec. 3115.

[17] See his able article in this JOURNAL, 1910, p. 95.

tracting state without alighting, provided the international routes be followed and no signal be given to alight.[18] Unless local law were superseded by federal regulation, there would be endless confusion caused by the local aërial police. The observance of the treaty in all its parts would be most difficult. So in regard to "ship's papers"; the annexes provide the details to be embodied in documents which aircraft must carry, which include the following:

(a) certificates of registration;
(b) certificate of airworthiness;
(c) certificate of minimum technical skill for commanding officer and pilot;
(d) licenses for pilots, navigators and engineers;
(e) list of passengers;
(f) bill of lading and manifest;
(g) log book;
(h) special license for wireless equipment.[19]

These requirements presuppose some coördination between the local and the national authorities, which federal regulation can alone provide.

Federal legislation will also be necessary to establish a policy relative to the restriction of the internal traffic to national aircraft. The convention does not *eo ipso* maintain such a policy, but leaves each state free to do so, evidently taking into account the legislation of many countries relating to coastwise maritime trade. Where the laws exclude foreign aircraft from the carriage of passengers or freight for hire between local points, aircraft of that state may be subjected to the same restrictions by a foreign state, even though the foreign state does not itself maintain the rule.[20]

PATENT RIGHTS IN AIRCRAFT MECHANISMS

A provision which seems to have raised considerable opposition in this country is that which guarantees immunity to any foreign aircraft from seizure or detention while within the airspace or upon the territory of another state "on the ground that the construction or mechanism of the aircraft is an infringement of any patent, design,

[18] Convention, Art. 15 and Annex D.
[19] *Ibid.*, Art. 19 and Annexes A, B, C, and E.
[20] *Ibid.*, Arts. 16-17.

or model, duly granted or registered in such state."[21] This provision relegates all claims for infringement to the jurisdiction of origin. The purpose was clearly to remove unnecessary burdens upon aviation while still in its infancy. The claims for broad or basic patent rights are apt to be much more numerous in a new art than in one the principles of which have long been known and applied. Perhaps it was feared that the seizures or detentions might be so widespread as actually to interrupt the free development of aërial navigation. We do not know of any similar exemptions anywhere in favor of maritime commerce, nor is it apparent why, on principle, there should be greater leniency shown to the infringer of a patent for the design or construction of aircraft than to one who infringes a patent of another description. Presumably local procedure will guarantee the good faith of the action by requiring security in the event of seizure or detention; likewise, rebonding will ordinarily be provided for just as for libels in admiralty. If the Commission desired to insure against abuse of process causing discouragement of international air navigation, the condition of security might well have been exacted by the convention itself. If the owner of an aircraft desires to enter the jurisdiction of a foreign state, he should be willing to take the burden of its just laws. Many an owner of a patent right might hesitate in good faith before incurring the expense and inconvenience of testing his right against an alleged infringer in a foreign country, but if aircraft containing the protected mechanism enters the legitimate field of exploitation of the holder of the patent, the latter should be permitted to test or exercise his rights in his own jurisdiction.

PRIVATE INTERNATIONAL LAW

It is somewhat surprising to find under the title: "Rules to be observed on departure, on landing, and when under way," a number of provisions not applicable primarily to the control of navigation, but rather to the choice of law competent to punish infractions and to determine private rights between persons traveling upon aircraft. Thus Article 23 provides: "The legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft." This rule will seem strange to lawyers unfamiliar with the principles of private international law in European countries.

[21] Convention, Art. 18.

The French text is somewhat clearer than the English as it refers to transactions "*qui se forment . . . à bord,*" thus limiting the rule to legal relations actually entered into on board an aircraft in flight. But even with this limitation, the rule operates in derogation of the established principles of private law. The same may be said of other provisions of Article 23 by which a state is deprived of jurisdiction to punish a crime or misdemeanor committed on board an aircraft in flight over its territory "except where such crime or misdemeanor is committed against a national of such state and is followed by a landing there during the same journey." On the other hand, each state undertakes to punish its own nationals for any violations of the rules laid down in the annexes relating to lights, signals, rules of the airway, ballast and other particulars of operation, irrespective of the territory over or upon which the violations were committed.[22] The result is to give extraterritorial jurisdiction over violations committed by nationals of the state, which, of course, reverses the principle of criminal jurisdiction recognized throughout the United States.

In the United States, and indeed in other countries having a federal system of delegated powers, the treaty-making authority acts with caution in modifying a rule of private law otherwise reserved to the States. Wide differences of opinion have arisen in reference to the constitutional scope of the treaty-making power of the United States. While the United States Supreme Court has never declared a treaty to be void because in derogation of local law, yet a tendency is noticeable in that tribunal to interpret such treaties with great strictness.[23] Even with the constitutional question out of the way, the treaty-making policy of the United States has thus far been opposed to the direct regulation of private international law by treaty. It is to be

[22] Convention, Arts. 24-25.

[23] See, for example, Rocca *v.* Thompson (1911), 223 U. S. 317, in which a treaty according the right to certain foreign consuls "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," was interpreted as not giving such consuls the right to be appointed administrators of the estates of the deceased. The constitutional question is involved in the treaty with Great Britain relative to migratory birds and in this connection the subject has been reviewed and discussed in a recent decision of the United States District Court in Arkansas. United States *v.* Thompson, 258 Fed. Rep. 257, Advance Sheets, September 25, 1919.

hoped that this policy will change with the expanding commerce of the United States. Much time and care have been given to the subject in negotiations with South American countries. Until some general policy has been determined, however, it would seem unsystematic and confusing to adopt rules of this character in highly specialized treaties such as the present, where the rules would be applicable only to acts and transactions taking place upon aircraft in flight.

THE INTERNATIONAL COMMISSION FOR AIR NAVIGATION

The convention provides for the organization of an international union for the administration of international air navigation and for the elaboration of legislation to be applicable to it from time to time. The organ of the union will be the International Commission for Air Navigation. Its organization is to be under the control of the League of Nations. Representation is measured somewhat after the principle adopted for the Assembly of the League. The five great Allies have each two representatives. All other contracting states have each one representative, the self-governing British Dominions and India counting for this purpose as states. The vote is taken according to states, but the five great Powers reserve to themselves the majority of the votes by the provision that each shall have "the least whole number of votes which, when multiplied by five, will give a product exceeding by at least one vote the total number of votes of all the other contracting states.[24]

The Commission will select its permanent seat. The first meeting is to be held in Paris as soon as the majority of the signatory states ratify the convention. The Commission receives and acts upon proposals for amending the convention, or any of its annexes, collects and communicates to the various states information of all kinds concerning international air navigation and all correlated sciences and arts; publishes official maps and gives opinions on questions which the states may submit for examination. Amendments must be formally ratified by the states, but a modification of any of the annexes may be made upon a three-fourths vote, without reference to the contracting states.

[24] Convention, Art. 35.

CUSTOMS ADMINISTRATION FOR AIRCRAFT

The greatly extended use of aircraft for commercial transportation which now seems impending will require entirely new methods of customs administration. The convention essays to lay down certain rules by which the states are to coöperate in administering customs and in the prevention of customs fraud. Aircraft must depart from and alight only upon especially designated "customs aërodromes." Places for crossing a frontier are to be indicated on aëronautical maps. The inspection of documents is regulated in a manner analogous to marine vessels; but the convention wisely allows a certain latitude for aircraft over which strict control at or near the frontier is not required.[25]

Even though customs administration as applied to aircraft be placed upon a uniform and internationally coöperative basis, opportunity for smuggling and fraud will be greatly enhanced by the introduction of this new means of transportation. Very many kinds of goods of high value but of light loading character are suitable for transportation over long distances by both airships and aëroplanes. In view of the fact that every field represents a port of embarkation and debarkation, and that delivery may be made with or without landing, by day or by night, customs control will be confronted with obstacles that seem almost insuperable. Even Tennyson foresaw "Pilots of the purple twilight, dropping down with costly bales." The expense of maintaining a customs-police adequate to meet the need may prove to be greater than any revenue return which might reasonably be expected. If this be true, the whole tariff system will be seriously affected in respect of many classifications.

ARBITRATION AND ADHERENCES

Any disagreement relating to the interpretation of the convention is to be referred to the Permanent Court of International Justice to be established by the League of Nations and, until its establishment, to arbitration. But the International Commission for Air Navigation is competent to determine, by a majority of votes, a dispute upon any of the technical regulations.[26]

A neutral Power may adhere to the convention by simple declara-

[25] Convention, Annex H.

[26] *Ibid.*, Art. 38.

tion. An enemy state may adhere to it upon becoming a member of the League of Nations. Otherwise a unanimous vote of the contracting states is necessary, or, after January 1, 1923, a three-fourths vote. The convention may be denounced upon one year's notice after January 1, 1922, but denunciation takes effect only as to the state giving the notice.[27]

Under the Peace Treaty with Germany, aircraft of the Allied and Associated Powers have full liberty of passage over and of landing upon German territory, without reciprocal rights. Germany agrees to enforce the necessary measures so that the rules of the present convention for the control of traffic shall govern both local and foreign aircraft in Germany, until Germany is permitted to adhere to the present convention.[28]

CONCLUSION

The convention represents in the main an admirable basis for the regulation of air navigation between nations. It bears evidence of having been principally the work of experts learned in the mechanisms and operation of aircraft. Many of its provisions deal exclusively with the practical problems of the art of aërial navigation. In so far as the convention deals with legal questions, it follows a principle of control over the airspace which preserves every demand of national sovereignty and at the same time encourages the development of navigation. Where the convention deals with the private relations of and criminal jurisdiction over persons traveling in aircraft, the jurists of Continental Europe seem to have carried the day with the application of the *lex patriæ*. Some compromise should have been effected between the Continental and the Anglo-American systems, or else the subject should have been omitted. It is not of first importance. The number of practical issues likely to arise will not be very great for some time to come, but the enforcement of these provisions within the United States might nevertheless become a source of embarrassment to the Federal Government.

Congress is confronted with the task of providing an adequate system of legislation for the regulation of aërial navigation. In order to be adequate, the system must be national in scope, just as the air-medium itself is national or international rather than local. The distance traversable in one flight and the speed at which aircraft travel,

[27] Convention, Arts. 43-45.

[28] Treaty of Versailles, Arts. 315-320.

taken together with the fact that uniform regulation is essential to safety, all combine as elements in favor of national regulation, although such regulation may rely upon local administration. The adoption of methods at first employed in the control of railroads or in legislation for the automobile would result in like confusion and would tend to discourage the development of aviation. Congress has full power to establish a uniform scheme for the nation.[29] Curiously enough, international regulation has been elaborated in advance of national or local legislation both here and abroad. The first British statute was a mere fragment though known under the formidable title: "The Aërial Navigation Act, 1911."[30] Detailed regulation has recently been made effective by the promulgation of the "Air Navigation Regulations"[31] which are to be coördinated with the present convention and the powers of the International Commission. Much of the present convention, especially the technical parts contained in the voluminous annexes, constitute material adaptable to national requirements. Just as the international rules of marine navigation apply also within territorial waters, so it is intended that air navigation shall likewise be regulated by laws common to the whole world.

[29] United States *v.* Rio Grande D. & I. Co. (1899), 174 U. S. 690; Lake Shore & M. S. Ry. Co. *v.* Ohio (1899), 173 U. S. 285; Louisville & N. R. R. *v.* Eubank (1902), 184 U. S. 27; Houston & E. & W. T. R. R. *v.* United States (1914), 234 U. S. 342.

[30] Public Statutes, 1 & 2 Geo. V, chap. 4.

[31] *London Gazette,* April 30, 1919; reprinted in *Flying,* July, 1919, p. 525.